Supreme Court, U.S.
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No. 94-___

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In The

Supreme Court of the United States

October Term, 1994

PAMELA REED,

Petitioner,

v.

DELTA AIR LINES, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is an employer in a sexual harassment suit relieved of liability for his supervisor's creation of a sexually hostile workplace environment by termination of the supervisor's employment, where the prolonged pattern and practice of sexually inappropriate conduct has produced severe psychological injury in the plaintiff?

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In The

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October Term, 1994

PAMELA REED,

Petitioner,

v.

DELTA AIR LINES, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above styled proceeding on April 13, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has not been reported. It appears in the Appendix at A19.

The opinion of the United States District Court for the Eastern District of Tennessee has not been reported. It appears in the Appendix at A1.

STATEMENT OF JURISDICTION

Petitioner filed her Complaint seeking damages and other relief for alleged violations of the Tennessee Human Rights Act, T.C.A. Section 4-21-101, *et seq.*, alleging sexual harassment in the workplace, in the Chancery Court for Knox County, Tennessee on March 26, 1992.

Subsequently, on April 29, 1992, the Respondent removed the matter to the United States District Court for the Eastern District of Tennessee. Thereafter, the parties consented to the case being assigned to Magistrate Robert P. Murian. The United States District Court for the Eastern District of Tennessee had subject matter jurisdiction over this action under 28 U.S.C. Section 1332 (1988).

The Magistrate granted the Respondent's Motion for Summary Judgment, dismissing the Petitioner's claims, on December 7, 1992.

Petitioner filed a timely notice of appeal with respect to the case on the merits.

On February 24, 1994, the Sixth Circuit issued its opinion affirming the District Court.

On March 10, 1994, the Petitioner filed a timely Petition for a Rehearing en Banc, or in the alternative, a Petition for Rehearing. On April 13, 1994, the Sixth Circuit declined the suggestion for a Rehearing en Banc,

denied the Petition for Rehearing but amended its opinion, which was filed *nunc pro tunc*. The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The Tennessee Human Rights Act (T.C.A. Section 4-21-401) provides, as follows:

> It is a discriminatory practice for an employer to:
>
> (1) Fail or refuse to hire or discharge any person or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of such individual's . . . sex . . . .

Section 703(a)(1) of Title VII, 42 U.S.C. Section 2000e-2(a) provides:

> It is unlawful employment practice for an employer –
>
> . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . .

STATEMENT OF THE CASE

As this matter was dismissed by the District Court below on motion for summary judgment, the state of the

record is that "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Petitioner Pamela Reed had been an employee of Respondent Delta Airlines since February 22, 1978. She was assigned to the Knoxville, Tennessee Reservation Sales Office, and for the past several years was employed there as a Reservation Sales Agent.

The composition of the work force of the Knoxville office consisted of approximately one hundred fifty (150) reservation sales agents who were supervised by eight (8) individual supervisors. The supervisors reported to the office's chief supervisor, Ms. Deborah Freshwater, and Ms. Freshwater in turn reported to the Reservation Sales Manager, Ms. Mary Howington. Each supervisor had a team consisting of between fifteen (15) and twenty (20) agents. Since Delta rotated supervisors over its Reservation Sales Agents, Ms. Reed eventually fell under the supervision of Mr. Shan Harris in April 1991.

A continuous and prolonged period of sexual harassment occurred during Ms. Reed's period of employment with Delta, beginning when Mr. Harris accosted and kissed her in a stockroom and continuing until some ten (10) years later when Mr. Harris sexually assaulted Ms. Reed. Ms. Reed alleged that some time during the early part of 1980 through 1982, Mr. Harris made a sexual advance upon her by cornering her in a stockroom and kissing her. When she challenged him for that act, he simply laughed and left. When knowledge of this incident was eventually forwarded to Delta Management,

Ms. Reed had a meeting with two (2) male supervisors, Mr. Patterson and Mr. Agee, both of whom were friends of Mr. Harris. These two male supervisors rebuffed Ms. Reed and told her that if she ever said anything of a similar nature, it would be grounds for her dismissal.

These two (2) male supervisors were eventually rotated from the Knoxville office and were subsequently replaced by new supervisors who had no actual knowledge of the incident between Ms. Reed and Mr. Harris.

During the following years, Ms. Howington and Ms. Freshwater, the two (2) main supervisory personnel in the Delta office, displayed a lax attitude regarding sexual harassment. They had at most one (1) meeting with their subordinates concerning sexual harassment in the workplace. At the one meeting, the supervisors were included but sales agents were not.

Ms. Howington and Ms. Freshwater did, however, know of the repeated sexual jokes and sexually provocative incidents that frequently occurred within the Knoxville office. Their only admonition was to tell the staff essentially to "keep it down", so that others would not hear.

During the period of Ms. Reed's employment with Delta, the following examples of Delta management's failure to control properly the workplace environment occurred: (1) Ms. Diane Jordan, a co-employee of Ms. Reed, testified that there was an incident in which balloons shaped like women's breasts were placed up and down a hallway in full view of customers, staff, and supervisors to celebrate the birthday of a full chested employee; (2) Admitted statements by Mr. Harris that he

constantly referred to women's breasts as "tits", "bodacious tata's," and "big hooters" without being reprimanded; (3) Sexually explicit statements by Mr. Harris every time he would walk into the commons area of the office, such as, "who's going to give me a blow job today"; (4) Mr. Harris' asking various women if they resembled women modeling underwear in various magazines; and (5) Mr. Harris placing his hands upon Reed's buttocks after being told not to do so. During this time, Delta management never attempted to correct Mr. Harris' behavior or to rebuke him.

Contemporaneously, moreover, a series of events occurred which dissuaded Ms. Reed from sharing her earlier accounts of Mr. Harris' activities with either Ms. Freshwater or Ms. Howington. Mr. Harris was allowed to remain as a supervisor after several incidents were brought to management's attention which strongly underscored his instability and lack of judgment. During two (2) major crises involving air traffic problems, Mr. Harris' stability and judgment were questioned, and in fact, he was relieved of his position once when upper management felt that he could not perform his job properly. In another incident, Mr. Harris was mildly reprimanded for being very discourteous to a female attorney who was talking to Delta staff.

Ultimately, these events culminated in 1991 in an incident that occurred during the Labor Day weekend, in which Mr. Harris, after arranging for Ms. Reed to be in the Delta office when it was largely vacant, sexually assaulted her. In the assault, he pushed her down on his desk, kissed her, placed his finger inside of her, and kissed her leg. Delta management, upon learning of this

particular incident, terminated Mr. Harris for unprofessional conduct in that he engaged in sexual activities while on the premises and during employment with Delta. A similar recommendation was not made against Ms. Reed.

After the sexual assault and subsequent firing of Mr. Harris, Ms. Reed returned to a work environment which was still extremely hostile toward her. She faced the resentment of co-workers who were sympathetic to Mr. Harris and who viewed Ms. Reed as an antagonist. Delta management did nothing to address the problem.

As a result of the sexual assault, the prolonged period of being subject to a hostile work environment, and the reaction of her co-workers to the above incident, Ms. Reed has suffered severe psychological injury. She has been diagnosed as suffering from Post Traumatic Stress Disorder.

The Magistrate dismissed the Plaintiff's case on Motion for Summary Judgment, reasoning in his Memorandum Opinion that: (1) Although Ms. Reed had told Delta management of Mr. Harris' propensities as early as 1980 or 1982, the Respondent lacked knowledge of Harris' propensities in 1990 or 1991, because Respondent had rotated away the early management team that did have notice; and (2) The timely investigation and firing of Mr. Harris after the sexual assault in 1991 was reported to them relieved the Respondent of any liability for the action of its agent.

REASONS FOR GRANTING THE WRIT

Without clear guidance from this Court, the Circuit Courts of Appeal have adopted positions in conflict with *Meritor Savings Bank v. Vincent*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), on the extent to which agency principles should be applied in a sexual harassment case where the Plaintiff proceeds under a "sexually hostile workplace environment" theory. The Circuit Courts of Appeal, and especially the Sixth Circuit, have implicitly adopted a position of "reverse absolute liability" in regards to the question of employer liability for the actions of the employer's supervisory personnel in creating a sexually hostile workplace environment. Such a standard results where employers whose supervisory personnel are responsible for the creation of a sexually hostile workplace environment are relieved of any liability for the effects of this environment if eventually the employer learns of the supervisor's improper behavior and terminates the supervisor's employment. Such is true even when the environment has long been sexually hostile and has had a profound effect upon the psychology of the victim.

The Tennessee Human Rights Act provides:

> It is a discriminatory practice for an employer to:
>
> (1) Fail or refuse to hire or discharge any person or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of such individual's . . . sex . . . . T.C.A. Section 4-21-401.

The language of T.C.A. Section 4-21-401 closely parallels that of Section 2000e-2(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e.

Although the remedies available under the Tennessee Human Rights Act are broader than those provided by Title VII, the standard of liability for an employer is the same under both statutes. See *Trentham v. K-Mart Corp.*, 806 F. Supp. 692 (E.D. Tenn. 1991); *Bruce v. Western Auto Supply*, 669 S.W.2d 95, 97 (Tenn. Ct. App. 1984). As there are no reported decisions under the Tennessee Human Rights Act defining "sexual harassment" or outlining the elements of a cause of action thereof, the Tennessee courts have looked to federal decisions under Title VII of the Civil Rights Act of 1964, or the Age Discrimination in Employment Act, 29 U.S.C. Sections 621, *et seq.*, for guidance in cases brought under the Tennessee Human Rights Act based on age, race, or sex discrimination. *See Bruce*, 669 S.W.2d at 95; *Brenner v. Textron Aerostructures*, 1993 WL 523647 (Tenn. Ct. App., Dec. 10, 1993); or *Wright v. Lamar Advertising Co.*, 1990 WL 37366 (Tenn. Ct. App., April 4, 1990).

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e), *et seq.*, provides that "it is unlawful for an employer to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment . . . because of such individual's . . . , sex, . . . ". Title VII invests in employees the right to work in an "environment free from discriminatory intimidation, ridicule and insult." *Meritor Savings Bank v. Vincent*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

In *Meritor*, this Court stated that it

> declined the parties' invitations to issue a definitive rule on employer liability, but . . . [that] we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common law principles may not be transferrable in all of their particulars to Title VII, Congress' decision to define "employer" to include an "agent" of an employer, 42 U.S.C. Section 2000e(b) [42 U.S.C.S. Section 2000e(b)], surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.

Meritor, 477 U.S. at 72, 91 L.Ed.2d at 63.

This Court in *Meritor* went on to hold that the Court of Appeals for the District of Columbia Circuit erred in

> concluding that employers are always automatically liable for sexual harassment by their supervisors. *See Generally Restatement (Second) of Agency*, Sections 219 through 237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate the employer from liability.

Id.

This Court also observed in *Meritor* that "one can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." *Meritor*, 477 U.S. at 66, 106 S.Ct. at 2405; *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972).

This Court should grant certiorari to resolve the issue of whether the termination of a Plaintiff's supervisor's employment relieves an employer of liability to the alleged victim of sexual harassment where the prolonged pattern and practice of sexually inappropriate conduct produced severe psychological damage in the plaintiff.

In the Sixth Circuit, the elements of a sexually hostile workplace environment claim are: (1) The employee was a member of a protected class; (2) The employee was subjected to unwelcome sexual harassment in the form of sexual advances, requests for favors, or other verbal or physical conduct of a sexual nature; (3) The harassment complained of was based on sex; (4) The charged sexual harassment had the effect of unreasonably interfering with the Plaintiff's work performance in creating an intimidating, hostile, or offensive working environment that affected seriously the psychological . . . well-being of the Plaintiff[1]; and, (5) The existence of respondeat superior liability. *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 183 (6th Cir. 1992), quoting *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619-620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 823 (1987). The Sixth Circuit, moreover, held in *Rabidue* that courts should look to common law principles of agency for guidance in determining an employer's liability for acts committed by their supervisors. *See also Kauffman*, 970 F.2d at 183. An employer's liability for the actions of his supervisor

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[1] This element in the post-*Harris* era is more properly regarded as an environment which a reasonable person would find offensive. *See Harris v. Forklift Systems, Inc.*, 510 U.S. ___, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

depends upon: (1) Whether [the supervisor's] harassing actions were foreseeable or fell within his scope of employment and (2) if they were, whether [the employer] responded adequately and effectively to negate liability. *Kauffman*, 970 F.2d at 184. *See also Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987). To determine whether the acts complained of occurred in the scope of the supervisor's employment, the court must look to factors such as "when and where the acts took place, and their foreseeability." *Kauffman*, 970 F.2d at 184, citing *Yates, supra.* Even if an act is forbidden, it can still be within the scope of employment. *Id.*

An employer is liable for the actions of his supervisor when the actions of a supervisor were foreseeable. This "foreseeability" standard differs from the respondeat superior standard for a "co-worker" sexually hostile environment case in that where sexual harassment results from interaction with a co-worker, the Plaintiff must prove "that the employer, through its agents or supervisory personnel, knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action." *Kauffman*, 970 F.2d at 183, *citing Rabidue*, 805 F.2d at 621.

In practice, the actual difference between the approach of the Sixth Circuit (foreseeability) and absolute employer liability for a supervisor's harassment has historically been negligible. *See, e.g., Yates*, 819 F.2d at 634. *Yates* does provide, however, that there is a prohibition against the automatic imposition of employer liability for supervisor's hostile sexual harassment. *Yates*, 819 F.2d at 634 (interpreting *Meritor* as holding that employers will not be automatically liable for the sexual harassment

committed by supervisors). The Sixth Circuit further provides that an employer may be relieved of liability for his supervisor's actions when he responds adequately and effectively to negate liability (i.e., terminate the supervisor) upon receiving notice of the sexually hostile environment. *Kauffman*, 970 F.2d at 184.

This approach of limiting employer liability upon the employer's receipt of notice of the work place environment has been followed by other circuits applying traditional agency principles. *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3rd Cir. 1990) (holding that if a Plaintiff proves that management-level employees have actual or constructive knowledge about the existence of a sexually hostile environment, to avoid liability the employer must "demonstrate that its supervisory employees investigated plaintiff's complaints and took adequate action to adequately curb sexism [present]"); *Waltman v. International Paper Co.*, 875 F.2d 468, 479 (5th Cir. 1989) (holding that an employer is not automatically liable for the actions of its employees but that the employer "may be liable despite having taken remedial steps if the Plaintiff can establish that the employer's response was not reasonably calculated to halt the harassment"); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 464-465 (7th Cir. 1990) (holding that the employer is liable for the supervisor's actions only if he "unreasonably fails to take appropriate corrective action," i.e., "if it delays unreasonably or if the action it does take, however prompt, is not reasonably likely to prevent the conduct from recurring"); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989) (holding that liability exists on employers for actions of employees and/or supervisors

in cases of hostile sexual environment harassment, when the employer was aware of such harassment but does not take effective steps to end the behavior); and, *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988) (noting that the employer's threat to fire the supervisor if the employee complained again "even if she was wrong – constitutes prompt remedial action for the harassment").

The sum and substance of the aforementioned cases spanning the various Circuit Courts of Appeals is that an employer may be relieved of liability for the actions of his supervisory employees in creating a sexually hostile workplace environment, if the employer immediately terminates the supervisor when he ultimately obtains notice of the improper conduct. While such a rule may be appropriate for situations involving a single incidence of sexual harassment, such a rule is inappropriate in those situations where there has been a pattern or practice of sexually inappropriate conduct. This rule, moreover, has been rejected by the Fourth Circuit. *See, e.g., Paroline v. UniSys Corp.*, 879 F.2d 100 (4th Cir. 1989) (holding that an employer is liable for the actions of its supervisors under Title VII when an employer "anticipated or reasonably should have anticipated that the Plaintiff would become a victim of sexual harassment in the workplace and yet failed to take action reasonably calculated to *prevent* such harassment").

In such a situation the employer should not be relieved of liability for his supervisor's actions merely because the employer terminates the supervisor. Such action on the part of the employer is relevant toward the

issue of mitigation of damages, but it should not be used to foreclose the issue of liability.

The rule is in effect a rule of "reverse absolute liability" on an employee who has been the victim of sexual harassment. Under this rule an employee who has been forced to endure a sexually hostile workplace environment created by a supervisor is denied recovery if the employer promptly reacts to terminate the supervisor irrespective of the length of time the Plaintiff has been forced to endure the environment, and irrespective of the degree of harm which the supervisor's actions have caused. The employer moreover can readily limit his liability by, for example, rotating his senior supervisory personnel, even though the environment long persists. The harm to the Plaintiff resulting from the pattern and practice of sexually hostile conduct found in such an environment has become irrelevant to the issue of the employer's liability. The focus of the court's inquiry is on causation, and the employee/victim is no longer part of the equation.

Such a rule is at odds with the Civil Rights Act of 1964 and this Court's holding in *Meritor*. In recognizing a cause of action for violation of Title VII upon proof that "discrimination based on sex has created a hostile or abusive work environment," this Court quoted with approval the Court of Appeals for the Eleventh Circuit's holding in *Henson v. Dundee*, 682 F.2d 897, 902 (1982) that:

> . . . surely a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

The Petitioner would urge this Court to revisit the question it left unanswered in the *Meritor* decision, that is the issuance of a definitive rule on employer liability, and the limits to which the application of agency principles can be invoked to relieve an employer of the liability for injury to a Plaintiff resulting from the actions of the employer's supervisory personnel.

Such a further pronouncement by this Court would provide needed guidance to the Circuit Courts of Appeal and would be in keeping with this Court's holding in *Harris, supra.* In *Harris,* this Court stated that:

> But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously effect an employee's psychological well-being can and often will detract from the employee's job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion or national origin offends Title VII's broad rule of work place equality.

Harris, supra.

This Court should hold that Title VII does not permit an employer to be relieved of the consequences of his supervisory personnel's long term pattern and practice of creating a sexually hostile workplace environment merely by discharging the offending supervisor upon notice of the supervisor's conduct. This Court should re-focus the

inquiry on whether the employee has suffered injury as a result of being forced to work in such an environment, for determining the basis upon which the employer should be held liable.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

PAMELA REED, Plaintiff,	)	CIV. NO. 3-92-0273 (MURRIAN)
v.	)	
DELTA AIR LINES, INC., Defendant.	)	

ORDER

For the reasons stated in a Memorandum Opinion this day passed to the Clerk, it is hereby **ORDERED** that the defendant's motion for summary judgment be, and same hereby is, **GRANTED**; that plaintiff take nothing on her claim; and that the Clerk close the file in this case.

ENTER:

/s/ Robert P. Murrian
Robert P. Murrian
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

PAMELA REED, Plaintiff,	)	CIV. NO. 3-92-0273 (MURRIAN)
v.	)	
DELTA AIR LINES, INC., Defendant.	)	

MEMORANDUM OPINION

This case is before the undersigned pursuant to 28 U.S.C. § 636(c) and Rule 73(b), Federal Rules of Civil Procedure, for all further proceedings, including entry of judgment [Doc. 4]. The defendant's motion for summary judgment is currently pending before this court [Doc. 19].

This is an action brought pursuant to the Tennessee Human Rights Act, T.C.A. § 4-21-101, *et seq.*, alleging sexual harassment in the work place. The plaintiff claims that her supervisor, Mr. Shan Harris, subjected her to sexually harassing activity between 1980 to 1982 until the fall of 1991; that this activity occurred with sufficient frequency so as to be anxiety provoking and detrimental to plaintiff's ability to perform her work activities; and that Mr. Harris wanted sexual favors from her in return for good evaluations and assistance.

Two types of sexual harassment claims are recognized by the case law:

> 1) harassment that creates an offensive or hostile environment; and 2) quid [pro] [quo] harassment, in which a supervisor demands sexual favors as a condition for job benefits.

Kauffman v. Allied Signal, Inc., Autolite Division, 970 F.2d 178, 182 (6th Cir. 1992). The plaintiff in this case alleges that she was subjected to both forms of sexual harassment.

A. QUID PRO QUO

The elements of a *quid pro quo* claim of sexual harassment include the following:

> 1) that the employee was a member of a protected class; 2) that the employee was subjected to unwelcomed sexual harassment in the form of sexual advances or requests for sexual favors; 3) that the harassment complained of was based on sex; 4) that the employee's submission to the unwelcomed advances was an express or implied condition for receiving job benefits or that the employer's refusal to submit to the supervisor's sexual demands resulted in a tangible job detriment; and 5) the existence of respondeat superior liability.

Kauffman, 970 F.2d at 186. *See also Highlander v. K.F.C. National Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986). A *quid pro quo* sexual harassment claim is grounded upon an employer/supervisor's sexually discriminatory behavior which forces an employee to choose between submitting to sexual demands or losing job benefits, employment, promotion, or other job related detriment. *Highlander*, 805 F.2d 649. The plaintiff bears the burden of

demonstrating that her acquiescence was an express or implied condition for receiving job benefits or that a tangible job detriment resulted from the employee's failure to submit to the sexual wishes of the supervisory employer. *Id.*

> Under a quid pro quo theory of sexual harassment, an employer is held strictly liable for the conduct of its supervisory employees having authority over hiring, advancement, dismissal, and discipline, under a theory of respondeat superior (citation omitted).

Kauffman, 970 F.2d at 186. *See also Highlander*, 805 F.2d at 648. It is not necessary that the supervisory employee have complete authority in all respects of hiring, firing, and controlling; rather, it is only necessary that the supervisory employee have "significant control" over employment conditions. A tangible job detriment need not be economic in nature. The United States Court of Appeals for the Sixth Circuit cited *Chamberlain v. 101 Realty, Inc.*, 915 F.2d 777 (1st Cir. 1990), with approval, wherein the court broadly interpreted the phrase "tangible job detriment":

> It is the essence of *quid pro quo* harassment that the employee "was subject[ed] to unwelcome sexual advances by a supervisor . . . and . . . her reaction to these advances affected tangible aspects of . . . her compensation, terms, conditions, or privileges of employment. . . . In rebuttal, the defendant may show that the behavior complained of either did not take place or that it did not affect a tangible aspect of the plaintiff's employment. . . .

Kauffman, 970 F.2d at 187, quoting *Chamberlain*, 915 F.2d at 783.

The plaintiff in this case alleges that her supervisor, Mr. Harris, conditioned his help and support in plaintiff's efforts to obtain a transfer to an "In-Flight" position upon the receipt of sexual favors from her.

It is my opinion that plaintiff's *quid pro quo* claim fails as a matter of law because the uncontradicted evidence of record demonstrates that plaintiff was not denied a job benefit and that she did not suffer a job detriment as a result of her failure to engage in any activities allegedly suggested by Mr. Harris. *See Highlander*, 805 F.2d at 648. Plaintiff testified at her deposition taken on August 27, 1992, that Mr. Harris initiated a conversation proposing the idea that plaintiff try to transfer to a job in inflight [Doc. 19a, Exhibit 2, Reed deposition at p. 107]; that after he made the initial suggestion to her, she pursued an interest in such a position [*id.* at 127]; that she did not know what input Mr. Harris might have in her ability to obtain an inflight job [*id.*]; that she believed that for someone in Reservations to transfer to a job in in-flight, the immediate supervisor's recommendation was needed [*id.* at 127-128]; that she thought she needed both her supervisor's and her manager's recommendation [*id.* at 128]; that Mr. Harris told her that she needed Mary Howington's recommendation [*id.*].; but that she was not told that Ms. Howington's recommendation was the only one she needed. *Id.* In her written memorandum to Ms. Howington setting forth her claims of sexual harassment by Mr. Harris, Ms. Reed states that regarding her transfer to in-flight, Mr. Harris told her, "If you will [f ___] me I will help you get anything." Plaintiff testified that there

was nothing inaccurate in that written memorandum [*id.* at 120]. Plaintiff further testified at her deposition that Mr. Harris told her that if she reconciled with her husband she could kiss any future position she wanted goodbye [*id.* at 180-181]; that Mr. Harris did not tell her what he meant by this statement at the time it was made [*id.*]; that four or five days later when Ms. Reed asked him why he made that statement, Mr. Harris explained to her that he meant that her judgment would be questioned if she reconciled with her husband [*id.*, and at 185]; that he never said he would do anything to interfere with her obtaining a job in inflight; but that the implication was there [*id.* at 183-184].

Mary Howington, Delta's Reservations Sales Manager, states in her affidavit that she has been in her position since June 1, 1981; that beginning in 1986, she talked informally with plaintiff several times about a transfer to an in-flight position; that each time, she informed plaintiff that she did not believe she would be a competitive candidate unless she improved her dependability and attendance record; that in the summer of 1991, plaintiff again informally approached her about the possibility of a transfer to in-flight; that she again told her that unless she improved her dependability, job presence, and attendance, she did not think plaintiff would be a competitive candidate; that on October 21, 1991, plaintiff submitted a memorandum requesting a transfer to in-flight; that at the time, no openings for in-flight jobs had been posted; that she told plaintiff she should bid when an opening was posted; that to her knowledge she never submitted a bid; that as her manager, she was never asked about plaintiff's qualifications regarding such a

position; that Mr. Harris approached her in the summer of 1991 and expressed support for plaintiff and asked if she would support plaintiff for an in-flight position; that she told Mr. Harris that plaintiff's poor dependability and attendance would prevent her from doing so; and that Mr. Harris was always supportive of the plaintiff and never sought to undermine her efforts to obtain an in-flight position [Doc. 19a, Exhibit 1].

Mr. Barry Noggle, Delta's Senior Personnel Representative since 1984, states in his affidavit that he is responsible for evaluating and interviewing applicants and bidders for flight attendant (or in-flight) and for hiring and placing applicants and bidders in such positions; that openings for in-flight positions are posted by Delta; that interested permanent employees are eligible to "bid" on a vacancy by completing and submitting a bid form; that his office reviews personnel files of bidders and selects for interviews those who appear most qualified from their files; that above average dependability and attendance records are prerequisites; and that after the interview the opinion of the bidder's manager is sought [Doc. 19a, Exhibit 4].

Plaintiff states in her affidavit that she spoke with Ms. Howington in early October, 1991, and expressed an interest in obtaining an in-flight transfer; that she asked her what she needed to do in this regard; that Ms. Howington told plaintiff that she should get written reports from physicians saying that her recent health problems would not interfere with her ability to perform the functions and duties in in-flight; that she obtained the letters; that at the time there was no formal vacancy for an in-flight position posted; that she prepared an Intracompany

memorandum on October 21, 1991 to Ms. Howington asking to be considered for in-flight; that on November 8, 1991, a Delta company bulletin was issued advising all employees that an in-flight position was available; that on November 12, 1991, she prepared and submitted a bid; and that on November 22, 1991, she received an acknowledgement that Delta had received her bid [Doc. 25a, Exhibit 2].

Mr. Mark Baxter, Delta's Senior Analyst – Equal Opportunity since 1985, states in his affidavit that he recommended that Mr. Harris be discharged; and that Delta approved his recommendation on October 21, 1991, retroactive to October 7, 1991, the day that Ms. Howington suspended Mr. Harris [Doc. 19a, Exhibit 5].

Assuming, *arguendo,* that the plaintiff's allegation that Mr. Harris offered to help her obtain an in-flight position with favorable evaluations and recommendations in return for sexual favors as true, the clear and uncontradicted evidence of record demonstrates that plaintiff did not suffer any tangible job detriment as a result of her refusal to comply with Mr. Harris' suggestions. Mr. Harris was suspended on October 7, 1991. The day that plaintiff informally expressed an interest in writing to Ms. Howington for an in-flight position was the day that Mr. Harris was **terminated** retroactive to the date of his suspension. Plaintiff's own affidavit establishes that Delta did not post an opening for an in-flight position until November 8, 1991, a little more than two weeks **after** Mr. Harris' termination, and plaintiff did not bid on the position until November 12, 1991. There is absolutely no evidence in this record linking the plaintiff's failure to obtain an in-flight position with her

refusal to comply with any of Mr. Harris' sexual requests. Rather, the record before me demonstrates that Mr. Harris supported plaintiff's efforts to obtain an in-flight position. Accordingly, the defendant has demonstrated, with the help of plaintiff's own testimony, that "the behavior complained of . . . , did not affect a tangible aspect of the plaintiff's employment. . . . " *Kauffman*, 970 F.2d at 187, quoting *Chamberlin*, 915 F.2d at 783. *See also Highlander*, 805 F.2d at 648 (court held that there was no viable *quid pro quo* claim because, *inter alia*, there was no evidence showing that the plaintiff was denied a job benefit or suffered a job detriment as a result of her failure to engage in the activities suggested by her supervisor).

For the reasons stated, the defendant's motion for summary judgment on the plaintiff's *quid pro quo* sexual harassment claim will be granted.

B. HOSTILE WORKING ENVIRONMENT

The elements of a hostile work environment sexual harassment claim are as follows:

> 1) the employee was a member of a protected class; 2) the employee was subjected to unwelcomed sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; 3) the harassment complained of was based upon sex; 4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the

> psychological . . . well-being of the plaintiff; and 5) the existence of respondeat superior liability.

Kauffman, 970 F.2d at 183, quoting *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619-620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041, 107 S.Ct. 1983 (1987). The Sixth Circuit held in *Rabidue, supra*, that courts should look to common law principles of agency for guidance in deciding an employer's liability for acts committed by their supervisors. *See Kauffman*, 970 F.2d at 183. Thus, to determine whether an employer is liable for the actions of its supervisors depends upon

> 1) whether [the supervisor's] harassing actions were foreseeable or fell within his scope of employment and 2) even if they were, whether [the employer] responded adequately and effectively to negate liability.

Kauffman, 970 F.2d at 184. *See also Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987). To determine whether the acts complained of occurred in the scope of the supervisor/agent's employment, the court must look to factors such as "when and where the acts took place, and their foreseeability." *Kauffman*, 970 F.2d at 184, citing *Yates, supra*. Even if an act is forbidden it can still be within the scope of employment. *Id.*

Assuming, for purposes of this motion, that plaintiff's allegations are true; that Mr. Harris' charged harassment unreasonably interfered with plaintiff's work performance and created an intimidating, hostile, or offensive working environment seriously affecting the plaintiff's psychological well being; and that Mr. Harris was acting within the scope of his employment, it is my

opinion that the record demonstrates without contradiction that as soon as plaintiff complained to Delta management regarding Mr. Harris's activities, Delta took immediate, adequate and effective measures to stop the harassment. *See Kauffman*, 970 F.2d at 185 (court held that even if the supervisor were acting within the scope of his employment, the defendant was protected from liability because "its response upon learning of [the supervisor's] harassment was adequate and effective. As soon as [plaintiff's] union representative informed the Director of Employee Relations about [the supervisor's] harassment of [plaintiff] . . . the management immediately confronted [the supervisor] and fired him.").

Mary Howington states in her affidavit that Delta's "Standard Practices" contains a written statement prohibiting sexual harassment; that the Standard Practices were available for all Knoxville employees to review in her Secretary's office; that she spoke with the plaintiff numerous times over the years regarding complaints plaintiff had about her work situation; that she also spoke with her about actions of supervisors with which the plaintiff did not agree; that plaintiff never complained of any sexual harassment until October, 1991; that she first heard of possible harassment of the plaintiff by Mr. Harris from Joan Mynatt, Janice O'Callaghan, and Marilyn Bible on or about October 4, 1991; that she confronted Mr. Harris on October 6 about these allegations; that on October 7, 1992, she suspended Mr. Harris pending investigation; that on October 7 she asked plaintiff specifically about the charges and told her to prepare a memorandum about her charges; that plaintiff gave her the memorandum on October 8, 1992; that plaintiff

related two incidents, one in 1981 and the other in November, 1990; that she also said that in the summer/ fall of 1991, Mr. Harris had engaged in inappropriate contact when the two were alone in his office; and that plaintiff never related to her that Harris had created a sexually hostile working environment for her between 1981 and 1991 [Doc. 19a, Exhibit 1].

The plaintiff testified at her deposition that when she called Delta's Equal Employment office she reached Mr. Richard Ealy, Director of Delta's Equal Employment office, *see* Doc. 17, Verification attached thereto; that Mr. Ealy told her to report the Labor Day incident to the supervisor over Mr. Harris; that she personally decided not to do that; that somewhere around late September she told Marilyn Bible, a supervisor on the same level as Mr. Harris, of the incident with Mr. Harris [Doc. 19a, Exhibit 3, Reed deposition at p. 39]; that her conversation with Mr. Ealy was mid to late September; that the supervisor above Ms. Bible, as well as Mr. Harris, is Deborah Freshwater, and the supervisor above Ms. Freshwater is Mary Howington [*id.* at 40]; that after Ms. Bible talked with Ms. Howington about the Labor Day incident, Ms. Howington talked to plaintiff [*id.*]; that Ms. Howington initiated the conversation three to four days after her conversation with Ms. Bible [*id.* at 41]; that the reason she decided not to report the incident to a manager over Mr. Harris was because she reported him many years prior and the validity of her statement was questioned; and that Mr. Harris had instilled mistrust in her regarding Ms. Howington and Ms. Freshwater by telling her that they did not like her and were out to get her [*id.* at 41]. The plaintiff admitted that she never had a conversation with

Ms. Howington and/or Ms. Freshwater regarding a complaint of sexual harassment; that she "quite possibly" had conversations with Ms. Howington or Ms. Freshwater regarding complaints about things that other managers had done [*id.* at 49]; that she never had any problem talking with Ms. Howington about supervisors or other problems at Delta [*id.* at 50]; that Ms. Howington did not do anything directly or indirectly to make her feel uncomfortable in talking to her [*id.*]; that she is familiar with Delta's "open door" policy; that the "open door" policy means that any Delta employee can make an appointment to see any member of management about any problems they have; that this was standard policy [*id.* at 51]; that Delta's "Standard Practices" was a manual of Delta's policies and procedures; that she had previously looked at this manual regarding benefits; that the manual was available in the manager's office or the manager's secretary's office [*id.* at 52]; that she asked to see the manual from time to time when she had an interest in examining some Delta policy [*id.*]; and that she does not recall ever complaining to any co-workers about Mr. Harris' conduct or comments prior to 1991, with the exception of the incident alleged in 1980 or 1982 [*id.* at 78]. Finally, plaintiff testified that Ms. Howington called her to her office and said she'd been made aware of a situation and asked plaintiff to tell her about it; that Ms. Howington told her to write up a statement and submit it to her within 24 hours [Doc. 19a, Reed deposition at p. 115]; and that Ms. Howington was concerned about the incident [*id.* at 119].

Again, according to the affidavit of Mr. Mark Baxter, Mr. Harris's discharge was recommended and approved

on October 21, 1991, retroactive to his suspension of October 7, 1991.

Donna Freshwater testified at her deposition, in pertinent part, that she had heard Mr. Harris refer to "well-endowed ladies" as having "bodacious ta-tas" [Doc. 25a, Freshwater deposition, at p. 19]; that he made these statements in a joke; that she does not recall such a statement ever being addressed to anyone; and that such comments were usually made in a relaxed social setting. *Id.*

Although Sheila Diane Jordan testified at her deposition that Mr. Harris used slang phrases for certain parts of the female anatomy, particularly breasts [Doc. 25a, Exhibit 6, Jordan deposition at pp. 14-18], she admits that she never complained to anyone about the breast jokes [*id.* at 23]. In fact, Ms. Jordan testified that **none** of the "Delta girls" who were the brunt of breast jokes talked with anybody at Delta about this [*id.* at p.23]. Additionally, although Ms. Jordan identifies Ms. Donna Brown as one of the female employees who was the subject of several large breast jokes and states that Ms. Brown was offended thereby, and although the plaintiff has submitted a portion of Ms. Brown's deposition testimony, plaintiff neither cites nor submits any portion of Ms. Brown's testimony wherein she testified to complaining to anyone at Delta about comments or jokes of a sexual nature made by Mr. Harris or any other employee.

Admittedly, Ms. Deborah Freshwater's testimony demonstrates that Delta management was aware of off-color jokes of a sexual nature. Her testimony does not at all indicate, however, that management was aware of any sexual harassment by Mr. Harris or any other male

employees. In fact, none of the evidence submitted by the plaintiff contradicts the defendant's evidence that as soon as Delta management received notice of the harassment complained of by the plaintiff, Mr. Harris was suspended and subsequently terminated retroactive to his suspension. Although there is proof that off-color jokes were frequently told and off-color statements were frequently made, the evidence does not support a finding that these jokes or statements were unwelcome, or, if they were, that Delta management **knew** that the jokes and statements were offensive and unwelcome. The record is devoid of any evidence that said jokes or statements were made the subject of any complaint to persons in a position to stop such activity at Delta. In fact, the plaintiff admits that she may have told and laughed at a few off-color jokes herself [Doc. 19a, Exhibit 3, Reed deposition at pp. 69-70]. Although plaintiff complained to management about a sexually offensive incident committed by Mr. Harris approximately 10 to 11 years prior to 1991, the statute of limitations has long run on this incident, *see Hoge v. Roy H. Park Broadcasting of Tennessee, Inc.*, 673 S.W.2d 157 (Tenn. App. 1984); *Puckett v. Tennessee Eastman Co.*, 1988 U. S. Dist. Lexis 18425 (E.D.Tenn. 1988) (UNPUBLISHED OPINION), and plaintiff's counsel, Mr. Jerrold Becker, Esq., represented at the pretrial conference that this incident is not the gravamen of plaintiff's complaint. Rather, Mr. Becker, represented at the pretrial conference that this incident is being used to demonstrate the beginning of Delta's notice of Mr. Harris' sexually harassing activities and to demonstrate the foreseeability of his offensive behavior. There is no dispute, however, that when plaintiff made her complaint known in 1980, 1981,

or 1982, the complaint was made to two male managers, Mr. Clarence ("Sammy") Patterson and Mr. John Agee, who were soon replaced by Ms. Howington and Ms. Freshwater. There is no evidence that either Ms. Howington or Ms. Freshwater were made aware of any proclivity Mr. Harris may have to sexually harass either the plaintiff or any other female employee or that either of them was made aware of the specific complaint plaintiff had made to previous management. As indicated, the statute of limitations has run on the incident about which Delta had notice in the early 1980's. Plaintiff did not complain about Mr. Harris's activities again for ten or more years. Certainly, Delta cannot be held liable based upon notice given of a single incident occurring ten or eleven years prior to the notice upon which Delta took action when no other complaint had been made in the interim sufficient to give Delta notice of any offensive activity. Although plaintiff relies upon the alleged threat to terminate her if she again complained about sexually harassing activity by Mr. Harris, which threat was made by Messrs. Patterson and Agee who preceded Ms. Howington and Ms. Freshwater, plaintiff admits in her deposition testimony that she complained about other problems with other supervisors to Ms. Howington and that Ms. Howington never did anything directly or indirectly to indicate to plaintiff that she would not be receptive to her problems or complaints. Plaintiff has not cited, and the undersigned has not found, any case law supporting the plaintiff's position that her subjective belief that management would not believe her complaints of harassment constitutes a justification for her failure to report these

incidents to someone at Delta who could rectify the situation. Delta should not be held liable for acts committed by its agents that it either knew nothing about or that it did not know were offensive and/or unwelcome. Thus, I find that there is no genuine issue of material fact regarding Delta's liability on plaintiff's hostile work environment claim because the undisputed record demonstrates that Delta took immediate, adequate and effective measures to stop the harassment once Delta management was made aware of its existence. *See Kauffman*, 970 F.2d at 185.

Accordingly, accepting plaintiff's allegations regarding her hostile work environment claim as true, for the reasons stated, I find that Delta cannot be held responsible for the conduct of Mr. Harris prior to being given notice that his conduct was harassing and offensive; and that Delta cannot be held responsible for the conduct of Mr. Harris after being given notice of his conduct because Delta took swift and appropriate action to stop the offensive activities in that he was immediately suspended and later terminated. Accordingly, the defendant's motion for summary judgment on the plaintiff's hostile work environment claim will be granted.

Order Accordingly.

FILE:

/s/ Robert P. Murrian
Robert P. Murrian
UNITED STATES
MAGISTRATE JUDGE

No. 93-5031

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAMELA REED, Plaintiff-Appellant, v. DELTA AIR LINES, INC., Defendant-Appellee.	)	ORDER (Filed Apr. 13, 1994)

BEFORE: NELSON and BATCHELDER, Circuit Judges; and CONTIE, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case; however, the panel has amended its opinion (attached) which has been filed *nunc pro tunc*. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

No. 5031

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAMELA REED, Plaintiff-Appellant, v. DELTA AIR LINES, INC., Defendant-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE (Filed Feb. 24, 1994)

Decided and Filed _____

BEFORE: NELSON and **BATCHELDER,** Circuit Judges, and **CONTIE,** Senior Circuit Judge.

PER CURIAM. This is a sexual harassment case in which the plaintiff seeks damages from her employer because of the misconduct of a first-line supervisor. The employer promptly fired the supervisor when it learned of his inappropriate behavior. Summary judgment was entered in favor of the employer, and the plaintiff has appealed. Upon *de novo* review, we conclude that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law. We shall therefore affirm the district court's disposition of the case.

I

The plaintiff, Pamela Reed, started with defendant Delta Airlines in 1978 as a reservation sales agent in Knoxville, Tennessee. Delta's Knoxville office employs about 150 reservation sales agents and eight reservation sales supervisors. Each supervisor oversees a team of fifteen to twenty sales agents, and the supervisors report to the Chief Supervisor, Ms. Deborah Freshwater. Ms. Freshwater, in turn, reports to the Reservation Sales Manager, Ms. Mary Howington. An individual named Shan Harris, who was a Delta employee for 23 years and a reservation sales supervisor throughout Ms. Reed's employment, became Ms. Reed's supervisor in April of 1991.

A. Evidence of a Hostile Environment

Ms. Reed says that sometime during the period between 1980 and 1982 – long before he became her supervisor – Mr. Harris cornered her in a stockroom and kissed her. When she reprimanded him, he laughed and left the room. Ms. Reed told a co-worker about the incident, and the story ultimately came to the ears of two other reservation sales supervisors, Messrs. Patterson and McGee. They told Ms. Reed that they thought she was lying and that any future complaints of a similar nature would be grounds for her dismissal. There is no indication in the record that either Ms. Howington or Ms. Freshwater knew about any of this prior to the lawsuit, although their predecessors were aware of the incident.

A second episode between Mr.. Harris and Ms. Reed occurred eight or ten years later, in November of 1990, at a marketing meeting both were attending in Asheville, North Carolina. Ms. Reed says that Mr. Harris invited her to spend the night with him. She refused and left the meeting early. Ms. Reed did not tell Ms. Howington, Ms. Freshwater, or anyone else at Delta about the incident before bringing suit.

During the summer of 1991, according to Ms. Reed, after Mr. Harris had become her supervisor, he initiated discussions in which he questioned her about personal matters, including her recent marital separation. In the course of these conversations he also made personal animadversions on his own marital situation. These discussions became uncomfortable, according to Ms. Reed, when Mr. Harris began to make professions of love and expressed sexual desire for her. Ms. Reed says that she responded to Mr. Harris' overtures by telling him he was crazy.

Ms. Reed says there were two occasions that summer when Mr. Harris touched her in a inappropriate manner. Ultimately, she says, Mr. Harris sexually assaulted her. She describes the incident as follows:

> " . . . I was going to use his phone. His phone was on the credenza behind him. And I was facing him. And he stands up, stands with his leg in between mine, and pushes me on his desk, and kissed me at that time . . . [He] put his hand up my shirt. And he had pushed me down on his desk and pulled my underwear over, put his finger inside of me and kissed my leg."

Ms. Reed reported the incident to Marilyn Bible, and through her it came to the attention of Ms. Howington. After promptly investigating the incident and interviewing both parties, Ms. Howington recommended that Mr. Harris be fired for having engaged in sexual activity in the office. (Mr. Harris did not deny that sexual activity occurred, but he gave a different account of the nature of the activity and claimed that Ms. Reed was a willing participant.) Ms. Howington's recommendation was approved, and Mr. Harris was discharged.

Aside from these incidents, Ms. Reed says, Mr. Harris repeatedly made sexual comments directed toward her and other female co-workers. On four or five occasions, she says, he issued generalized invitations, before groups of sales agents, to participate in lewd activities with him. She also alleges that Mr. Harris regularly told her she was "sexy" and occasionally picked up magazines and made suggestive remarks to her and others about the women depicted in them. There is no contention that any employee – including Ms. Reed herself – reported any of this to Mr. Harris' superiors.[1]

Ms. Reed describes one incident, connected with the birthday of one of her co-workers, that did come to

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[1] Mr. Harris did receive reprimands for other types of unprofessional conduct during his tenure at Delta. He was once reprimanded for insulting a female attorney who was giving a presentation to Delta employees, and he was also rebuked for making a disparaging comment about the female managers at Delta. On two occasions, Delta management expressed dissatisfaction with Mr. Harris' handling of crisis situations that arose at work.

management's attention. To mark the co-worker's birthday, employees put up balloons shaped like breasts along the hallways, in plain view of the staff and customers. Although management clearly was aware of this situation nobody ordered that the decorations be removed.

Delta had a published policy against sexual harassment in the workplace, but Ms. Reed and her co-workers never complained to management about Mr. Harris' conduct or any other workplace conduct they found offensive. Delta contends that they did not complain because Ms. Reed and her co-workers were willing participants in the sexual commentary that occurred in the office. Mr. Harris testified that Ms. Reed was a flirtatious person who regularly talked about her sexual activities, commented on the appearance of male employees, and once asked him, after she had undergone breast implant surgery, if he would like to see her "new" breasts.

After Mr. Harris was fired, Ms. Reed requested a transfer out of the Knoxville office. The request was not granted, and Ms. Reed says that she was subjected to various forms of retaliation by co-workers who were upset with her for having caused Mr. Harris to lose his job. Ms. Reed complains that Delta did nothing to ameliorate this situation.

B. Evidence of *Quid Pro Quo* Harassment

In 1986 Ms. Reed let Delta know that she would like to become a flight attendant. Mr. Harris was aware of this desire, and Ms. Reed says that Harris told her explicitly that he would help her get the flight attendant position if she would engage in sexual intercourse with him. On a

subsequent occasion, conversely, when Ms. Reed told Mr. Harris that she was patching things up with her husband, Mr. Harris told her that he would prevent her from getting an in-flight position. Ms. Reed admits, however, that he later told her he would not interfere.

Although Ms. Reed acknowledges that Mr. Harris did not have authority to decide whether she would get an in-flight position, she contends his recommendation for the job was crucial to the hiring decision. She maintains, therefore, that her difficulties with Mr. Harris are the reason she was never given the position.

II

Ms. Reed sued Delta in state court under the Tennessee Human Rights Act, T.C.A. §§4-21-101, *et seq.* Delta removed the case on diversity grounds to the United States District Court for the Eastern District of Tennessee. The parties consented to the assignment of the case to Magistrate Judge Robert P. Murrian, pursuant to 28 U.S.C. §636(c), for all purposes including judgment. Magistrate Judge Murrian granted a motion by Delta for summary judgment, and this appeal followed.

III

The Tennessee Human Rights Act provides, in relevant part, as follows:

"It is a discriminatory practice for an employer to:

(1) Fail or refuse to hire or discharge any person or otherwise to discriminate against any individual with respect to compensation, terms,

> conditions or privileges of employment because of such individual's . . . sex. . . . " T.C.A. § 4-21-401.

The language of §4-21-401 closely parallels that of §2000e-2(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. Although the remedies available under the Tennessee Human Rights Act are broader than those provided by Title VII, the standard of employer liability is the same under both statutes. *See Trentham v. K-Mart Corp.*, 806 F.Supp. 692 (E.D. Tenn. 1991); *Bruce v. Western Auto Supply*, 669 S.W.2d 94, 97 (Tenn. App. 1984). In the absence of contrary Tennessee case law on the subject of employer liability for sexual harassment in the workplace, we are guided in our decision by Title VII cases.[2]

The prohibition against discrimination because of sex extends to sexual harassment. Actionable sexual harassment may take a *"quid pro quo"* form in which favorable terms of employment are conditioned on submission to sexual advances, or it may take the form of a sexually hostile work environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986).

A

In the recent case of *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993), the Supreme Court declared that a hostile environment claim may be based on a showing that the harasser's conduct was "severe or pervasive

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[2] The parties have relied exclusively on federal cases to support their positions concerning employer liability for the harassing conduct of supervisory personnel.

enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive." *Id.* at 370. The Court also said that the plaintiff must "subjectively perceive the environment to be abusive" to such a degree that the conduct "actually altered the conditions of the [her] employment." *Id.* To succeed on a hostile environment claim based on the conduct of one of the defendant's employees, the plaintiff must articulate a basis on which to hold the employer liable. *Vinson,* 477 U.S. at 72.

The magistrate judge assumed the truth of Ms. Reed's allegations and assumed that Mr. Harris had subjected her to a severe and pervasive sexually-hostile work environment in the summer of 1991. He found, however, that Ms. Reed had made no showing that Delta should be held answerable for the unauthorized misconduct of its employee. The court reasoned that because Delta had taken immediate and effective remedial action by firing Mr. Harris as soon as it had notice of his wrongdoing, there could be no liability on Delta's part.

In *Vinson,* 477 U.S. at 72 (1986), the Supreme Court declined to prescribe a definitive rule on employer liability for harassment at the hands of supervisors. The Court declared, however, that the courts should look to common law agency principles for guidance. Under established agency principles, the Court noted, absence of notice does not necessarily insulate the employer from liability; by the same token, however, there is no invariable rule of absolute liability for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known of the misconduct. *Id.* The existence of grievance procedure and a failure to

invoke it are not necessarily dispositive, finally, although facts such as these are "plainly relevant." *Id.* Unwilling to generalize further, the Court indicated that employer liability for sexual harassment by supervisors is heavily dependent upon "the circumstances of [the] particular case." *Id.* at 73.

In *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987), where a supervisor with authority to hire, fire, and promote was found to have engaged in sexual harassment against a subordinate at work, and the employer, although it had been placed on notice of the supervisor's apparent inability to conduct himself properly toward the company's female employees, failed to deal with the problem effectively, this court, guided by traditional agency principles, concluded that the employer could be held liable. *Yates* recognized that "agency liability," as we subsequently termed it, "is not strict and can be negated if the employer responds adequately and effectively once it has notice of the actions." *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 184 (6th Cir.), *cert. denied*, 113 S. Ct. 831 (1992). *Kauffman* was a case in which the employer did respond "adequately and effectively" once it had notice of what the offending supervisor was doing; when apprised of the facts, the company immediately terminated the wrongdoer's employment. The discharge was held to protect the employer from liability for sexual harassment. *Id.* at 184-85.

In the case at bar Ms. Reed argues that the dismissal of Mr. Harris was not sufficient, Delta's management long having acquiesced in a sexually-charged workplace and having failed to put an end to off-color jokes and commentary. She also argues that Delta's response was too

late because management had long been on notice – because of the rude and unstable, albeit non-amorous, behavior for which Harris had been reprimanded – that Mr. Harris was likely to harass employees sexually.

Having reviewed the record before us *de novo*, we are satisfied that Delta's response was sufficient to relieve it of liability. The dismissal of Mr. Harris adequately and effectively eliminated any sexually-hostile work environment created by him, and the response was not untimely. The rude behavior for which Mr. Harris had been reprimanded was not indicative of a propensity to harass people sexually, and Delta had no real notice of any such propensity. None of the earlier incidents involving sexual commentary by Mr. Harris had been reported to Delta, moreover, and the company had no reason to know that the office environment was unacceptable (if it indeed was) to any of its female employees.

The fact that Delta did not discipline Mr. Harris earlier does not make its response inadequate. Neither does the fact that Delta took no action against the co-workers who were said to be unpleasant to Ms. Reed after Mr. Harris lost his job. The unpleasantness, if any, was not itself sexual in nature, and the law obviously cannot require a company to insure that its employees will be liked by their peers.

B

Ms. Reed also claims that the district court erred in granting the defendants summary judgment on her *quid pro quo* claims. In *Highlander v. KFC National Mgmt. Co.*,

805 F.2d 644 (6th Cir. 1986), this court set forth the elements of such a claim. The plaintiff must show

> "(1) that [she] was a member of a protected class; (2) that [she] was subjected to unwelcomed sexual harassment in the form of sexual advances or requests for sexual favors; (3) that the harassment complained of was based on sex; (4) that the employee's submission to the unwelcomed advances was an express or implied condition for receiving job benefits or that the employee's refusal to submit to the supervisor's sexual demands resulted in a tangible job detriment; and (5) the existence of respondeat superior liability." *Id.* at 648.

The magistrate found here that even if the other elements of the claim could be proved, Ms. Reed could not establish the fourth element of her case – namely, that any job benefit was made conditional on her compliance with sexual demands, or that she suffered any tangible job detriment by virtue of her refusal to acquiesce. Ms. Reed contends that she was denied a tangible job benefit – the in-flight position she requested – as a result of her refusal to submit to Mr. Harris' requests for sexual favors. Ms. Reed admits that Mr. Harris did not have decision-making authority with regard to her bid for an in-flight position, but she says that his recommendation carried significant weight in the ultimate hiring decision. Be that as it may, Ms. Reed has offered no evidence that Mr. Harris did, in fact, give her a less than positive recommendation for the job. According to the affidavit of Mary Howington, Chief Supervisor Freshwater's superior, Harris always expressed support for Ms. Reed's bid for an in-flight job – and the affidavit stands unrefuted. In

order to be actionable, the loss of a job benefit must be causally related to the plaintiff's response to sexual demands. *Highlander,* 805 F.2d at 649.[3]

AFFIRMED.

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[3] The Supreme court's recent decision in *Harris* does not alter our conclusion that a tangible job detriment is required in *quid pro quo* cases. Although *Harris* removed the requirement that a plaintiff show concrete psychological harm arising out of sexual harassment, the *Harris* decision applies only to hostile environment theories of sexual harassment. 114 S. Ct. at 369 ("[i]n this case we consider the definition of a discriminatorily 'abusive work environment' (also known as a 'hostile work environment')").

No. 94-67

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In The

Supreme Court of the United States

October Term, 1994

PAMELA REED,

Petitioner,

v.

DELTA AIR LINES, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The Sixth Circuit Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether certiorari should issue to the Sixth Circuit in this case, which presents issues of Tennessee state law only, where the court below applied clear precedent of this Court, without any conflict with other Circuits, in holding that agency principles determine when an employer is liable for a sexually-hostile working environment allegedly created by its supervisor.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

STATUTES INVOLVED

The only statute involved is the Tennessee Human Rights Act (Tenn. Code Ann. § 4-21-401 (1991)), which provides in relevant part as follows:

(a) It is a discriminatory practice for an employer to:

> (1) Fail or refuse to hire or discharge any person or otherwise to discriminate against an individual with respect to compensation, terms, conditions or privileges of employment because of such individual's . . . sex. . . .

STATEMENT OF THE CASE

This is an action for alleged sexual harassment in the workplace under the Tennessee Human Rights Act. Petitioner, Pamela Reed, seeks to hold Respondent, Delta Air Lines, Inc.[1] ("Delta"), liable for the alleged actions of her former supervisor, Mr. Shan Harris. Although Ms. Reed's Statement of the Case is accurate to some extent, it contains certain misstatements or omissions, which Delta discusses below.

First, Ms. Reed asserts that she suffered a "continuous and prolonged period of sexual harassment" by Mr. Harris. Brief of Petitioner, p. 4. That is a gross overstatement. In reality, she alleges that sometime between 1980 and 1982, Mr. Harris kissed her on the cheek while she was in a stock room. By her own admission, he did not touch her again until 1991, although she claims that he sporadically made certain sexually-related comments (discussed below) during that approximately ten-year period, about which she registered no complaints with Delta management.

---

[1] As required by Supreme Court Rule 29, Delta states that it has no parent companies and no non-wholly owned subsidiaries.

Next, Ms. Reed repeats the assertion made below that the two male supervisors who counseled her about the stock room kiss, Messrs. Agee and Patterson, told her that if she ever said anything like that again, it would be grounds for dismissal. *Id.* at 5. Although Ms. Reed acknowledges that these two supervisors were "eventually rotated from the Knoxville office" (*id.*), she neglects to state where these gentlemen fit within the management structure or that, soon after this incident, female management took over. At the time of the stock room kiss, both Mr. Patterson and Mr. Agee were Reservation Sales Supervisors, who in turn reported to Reservations Sales Manager of the Knoxville office, Sam Peters. Reed Depo., pp. 47-48; Howington Aff., ¶ 3. Ms. Mary Howington replaced Mr. Peters on June 1, 1981. Howington Aff., ¶ 2.

Neither Ms. Howington nor Ms. Freshwater, Ms. Howington's immediate subordinate and the Chief Supervisor over Mr. Harris, ever made comments to Ms. Reed like those allegedly made to her by the two males, and never suggested they would not be receptive to complaints from her. In fact, Ms. Reed felt that she could talk freely with Ms. Howington and Ms. Freshwater, and she often did. Reed Depo., pp. 49-51.

Ms. Reed also omits certain other, very important facts that were available to the courts below. For example, Delta's "Standard Practice" contains a written statement prohibiting sexual harassment. Howington Aff., ¶ 4 & Howington Aff. Exh. 1. Ms. Reed knew that Delta's Standard Practice Manual was available for her review in the manager's or the manager's secretary's office, and she had from time to time reviewed it when she wanted to know Delta's policy on a subject. Reed Depo., pp. 51-52.

Ms. Reed also knew of Delta's "Open Door Policy." This policy, in Ms. Reed's words, is one that gives any Delta employee the opportunity to make an appointment to see any member of management about any problem that he or she may be experiencing. *Id.* Indeed, Ms. Reed admitted that she had conversations with Ms. Howington and Ms. Freshwater concerning complaints about various things that supervisors had done. *Id.* at 49. Moreover, Ms. Reed had no difficulty talking with either Ms. Howington or any of the supervisors about problems that she had at work. *Id.* at 50.

Despite her contention in this Petition that she was forced to endure years of harassment, Ms. Reed did not complain to any co-worker or to any supervisor about Mr. Harris's alleged offensive, sexually-related comments during this ten or eleven year time frame. *Id.* at 79. Moreover, she could not recall any specific conversation with Mr. Harris in which she either told him that his alleged comments were offensive or asked him to stop. *Id.* at 77-78.[2]

Ms. Reed next makes the baseless accusation that Ms. Howington and Ms. Freshwater had a "lax attitude regarding sexual harassment." Brief of Petitioner, p. 5. She also contends that at no time was anyone told to stop off-color jokes and what she describes as "sexually provocative incidents." *Id.* at 5-6.

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[2] Ms. Reed also testified that some of her co-workers occasionally made offensive, sexually-related comments to her and to others. Reed Depo., pp. 65-73. She made no complaints to a supervisor about these alleged statements, either. *Id.* at 79.

Because *no one ever complained* about the atmosphere in the reservation sales office, there was no reason for a management reaction. Indeed, the off-color jokes and incidents described by Ms. Reed, many of which were not directed at her, not committed by Mr. Harris, or exaggerated by her, apparently were not deemed "unwelcome" by anyone, including Petitioner, since no complaints were registered. Moreover, she often was a participant in these activities.[3]

Petitioner lists five incidents that she contends shows Delta's alleged failure to take action to end a hostile environment. The first incident she lists involved Ms. Diane Jordan. Brief of Petitioner, p. 5. In her deposition, however, Ms. Jordan testified that she was not offended by the balloons Ms. Reed describes in her Brief, and she did not complain about them. A14.

With regard to the second incident, *i.e.*, Mr. Harris's reference to certain females as having "bodacious ta-tas" (Brief of Petitioner, pp. 5-6), the District Court found that the comments were not reported as offensive by anyone. A14. Indeed, Ms. Freshwater testified that Mr. Harris used the phrase in a joking manner; it was not addressed to anyone in particular; and was spoken in a relaxed, social setting. *Id.*

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[3] Ms. Reed does not deny that she made sexual comments in a kidding manner during this time period. Reed Depo., p. 64. She admits that she laughed at sexually-related jokes that were told and possibly told some herself. *Id.* at 69. She also admits that it was common practice for employees to tell jokes of a sexual nature in the reservation office; that she participated in these joke-telling sessions; and that she did not find them offensive. *Id.* at 69-70, 73-74.

Ms. Reed overstates her case in the third incident listed when she asserts that Mr. Harris made sexually explicit statements about oral sex "every time" he walked into the common area of the office. Brief of Petitioner, p. 6. Ms. Reed actually testified that, during the ten or eleven year period after the alleged stock room kiss, on four or five occasions, Mr. Harris asked her and an assembled group of reservation sales agents, "Who is going to give me a blow job this morning?" Reed Depo., pp. 57-59. Ms. Reed offered no testimony to corroborate this assertion.

Petitioner's attempt to paint sporadic events as continuous and exaggerate her actual testimony is exemplified in the fourth claimed incident. She asserts that Mr. Harris asked various women if they resembled women modeling underwear in various magazines. Brief of Petitioner, p. 6. Petitioner actually testified that Mr. Harris occasionally picked up catalogs or magazines and made comments about the women's underwear displayed therein. Reed Depo., p. 58. Ms. Reed states that some of those comments were directed at her and some were directed at others. *Id.* at 59. In one instance, Ms. Reed claims that Mr. Harris picked up a *Vogue* magazine and said that he thought Ms. Reed resembled a woman in an advertisement. *Id.* at 60. Ms. Reed did not tell Mr. Harris to stop. Instead, she testified that her way of telling Mr. Harris that she found that comment offensive was to look at him in a disgusted manner, turn around, and go back to work. *Id.* at 61, 77.

The fifth incident Ms. Reed describes, in which Mr. Harris allegedly placed his hands on her buttocks (Brief

of Petitioner, p. 6), was simply not something Delta management could have observed; because, if it occurred, it occurred privately, behind closed doors between Ms. Reed and Mr. Harris, and she did not report it. Reed Depo., pp. 95-97. Ms. Reed's attempt to make the facts appear more egregious by lumping a secret encounter such as this together with the sporadic jokes and comments which occurred in the office's common areas over an alleged ten or eleven year period should be rejected. Management cannot have been and was not on notice about "touching" which it did not see, and which she did not report.

Ms. Reed would have this Court believe that the sporadic, unconnected statements or incidents she describes in her Petition ultimately "culminated" in a 1991 sexual assault against her by Mr. Harris. Brief of Petitioner, p. 6. In reality, the sexual assault (if it occurred) went well beyond anything that had allegedly happened before. Although Ms. Reed repeats here her version of what happened "behind closed doors" between Mr. Harris and her on Labor Day weekend 1991, she neglects to mention that she did not report this alleged incident until October 1991.

As soon as Ms. Reed reported the Labor Day weekend incident, Delta suspended Mr. Harris and investigated her allegations by interviewing both Ms. Reed and Mr. Harris. Ms. Reed testified that Ms. Howington was very receptive to her and wanted to know the facts. Reed Depo., pp. 119-20. Although the investigation revealed

conflicting stories,[4] Delta terminated Mr. Harris, a 23-year employee, on October 21, 1991. It is undisputed that Delta took prompt remedial action to end the alleged sexually-hostile working environment as soon as Ms. Reed complained.

Finally, Ms. Reed claims that, upon her return to work after the termination of Mr. Harris, her co-workers were "extremely hostile" to her. Brief of Petitioner, p. 7. As Ms. Reed candidly admitted in her Brief in the Sixth Circuit, she was not liked by her co-workers before she reported Mr. Harris's alleged misconduct. She had no reason to expect her popularity to improve afterwards. Finally, the fact that she was not liked by her peers has nothing to do with the *sexual* harassment claim she makes here. A28.

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[4] Mr. Harris, who no longer works for Delta, testified that Ms. Reed was a flirt who talked constantly about her sexual relationships. Harris Depo., pp. 34-37. He stated that she talked to him about her personal life, and even asked him on one occasion after she had implant surgery if he wanted to see her "new" breasts. *Id.* at 82-84. He also stated that Ms. Reed talked about her sexual activities a great deal. *Id.* at 88-93. He testified that all of the sexual activity between Ms. Reed and him was consensual, and that she had initiated it. *Id.* at 96-104. Finally, he stated that Ms. Reed would make comments about the anatomy and appearance of male Delta employees. *Id.* at 121.

SUMMARY OF THE ARGUMENT

This is not a proper case for grant of certiorari under Supreme Court Rule 10 because it was brought under Tennessee state law. There is no federal question presented in this case. The District Court and Sixth Circuit below merely looked to federal law in interpreting Tennessee law.

Even if the use of federal precedent presents an issue of federal law, there is no conflict either between the decision below and *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), or between the decision below and the opinion of any other federal Circuit Court of Appeal, including *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), *vacated in part*, 900 F.2d 27 (4th Cir. 1990) (*en banc*). Instead, the Circuit Court decisions are in harmony with *Meritor's* directive that agency principles determine when an employer is liable for the sexually-hostile working environment created by its supervisor.

ARGUMENT

A. This State Law Case Is Not A Proper One For Certiorari

This case was brought under the Tennessee Human Rights Act, *not* federal law, and, as such, this is not the type of case this Court has defined as eligible for certiorari. *See, e.g.*, Sup. Ct. R. 10.

Petitioner argues that certiorari should be granted because the decision of the Sixth Circuit below is (1) in conflict with this Court's opinion in *Meritor Savings Bank*

v. Vinson; and (2) in conflict with the Fourth Circuit's opinion in *Paroline*. Brief of Petitioner, pp. 8, 12-14.

Even assuming the existence of the asserted "conflict,"[5] these arguments have no merit under the clear terms of Supreme Court Rule 10. First, Rule 10(1)(c), which deals with the grant of certiorari to a court of appeals that has brought itself into "conflict" with a Supreme Court decision, does *not* apply here. That provision applies only to instances where "a United States court of appeals . . . has decided a **federal question** in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10(1)(c) (emphasis added).

No federal question was decided below. The case was not filed under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, but instead was filed in state court under the Tennessee Human Rights Act, and subsequently removed to federal court under diversity jurisdiction. The opinions below were based on state law, as mandated by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and merely used federal precedent under Title VII as a guide, because no Tennessee Supreme Court decisions apply the Tennessee Human Rights Act to the sexual harassment area.

It has routinely been this Court's practice, as stated in Rule 10, not to grant certiorari to review questions of state law such as those presented here. *See, e.g., Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("We emphasize,

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[5] As Respondent will show *infra* at Argument B, there is no conflict between the decision below and a decision of this Court or between the decision below and *Paroline*.

however, that, standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review."); *Richards v. United States*, 369 U.S. 1, 16 n.35 (1962) ("We ordinarily accept the determinations of Courts of Appeal on questions of state law. . . . "); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) ("[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts. . . . "). The Court should follow that practice here.

Likewise, Petitioner's second conflict argument makes the same mistake. Supreme Court Rule 10(1)(a) states that certiorari will generally be granted only when "a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter[.]" Because this case rests on Tennessee law, no other federal Circuit Court of Appeal has applied the Tennessee Human Rights Act in a contrary fashion.

Because her case does not fit within the provisions of Rule 10 she has advanced,[6] Petitioner may be seeking certiorari to review alleged errors by the courts below in assessing the undisputed facts and granting summary judgment to Delta under the Tennessee Human Rights Act. However, this Court uses its certiorari jurisdiction to

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[6] Petitioner has not argued, and could not support, the contention that certiorari would be proper under the two remaining grounds allowed in Rule 10 – Rule 10(1)(a) (departure from the accepted and usual course of judicial proceedings) and Rule 10(1)(b) (errors by state courts).

examine issues of Constitutional or federal statutory importance, not to engage in the correction of asserted errors in assessing evidence. *Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (" 'We do not grant a certiorari to review evidence and discuss specific facts.' ") (quoting *United States v. Johnston*, 268 U.S. 220, 227 (1925)); *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."); *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."). But, that is precisely what Petitioner asks this Court to do. Because this Petition is not based on any of the grounds provided by Supreme Court Rule 10, it should be denied.

B. Certiorari Is Unnecessary Here Because The Sixth Circuit Below Applied Agency Principles As Directed By This Court Without Conflict With Any Other Circuit Court of Appeal

Even if this Court were to disregard the parameters of Rule 10 and consider the "merits" of her arguments, Petitioner's contentions that the decision below is in conflict with either *Meritor* or the Fourth Circuit's decision in *Paroline* are without merit. The Sixth Circuit correctly applied clearly existing precedent of this Court, and its decision is in harmony with other Circuit Courts of Appeal.

In *Meritor*, this Court noted that Title VII's language "evinces an intent to place some limits on the acts of

employees for which employers under Title VII are to be held responsible." 477 U.S. at 72. Accordingly, this Court directed lower courts to "look to agency principles for guidance in this area." *Id.*[7]

The Sixth Circuit's opinion below faithfully follows *Meritor*'s directive to apply agency principles to determine when an employer is liable for the harassing act of a supervisor. A25-27. But, in accordance with those principles, the court below stated that agency liability " 'is not strict and can be negated if the employer responds adequately and effectively once it has notice of the actions.' " *Id.* at A27 (quoting *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 184 (6th Cir.), *cert. denied*, 113 S.Ct. 831 (1992)). Because Delta took prompt, remedial action once Ms. Reed complained, the Sixth Circuit affirmed the District Court's decision that Delta was not liable for the alleged sexually-harassing acts of Mr. Harris. A28.

As the Petition correctly observes (pp. 13-14), the other Circuit Courts of Appeal are in agreement with the Sixth Circuit's application of *Meritor*. The only case Petitioner asserts is in "conflict" with the decision of the Sixth Circuit below (and the other Courts of Appeal) is the Fourth Circuit's *Paroline* decision.

However, Petitioner's claim of the existence of a conflict in the Circuits is incorrect. The difference in result

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[7] The existence of an adequate complaint procedure for employees to use if harassed and a failure to utilize it, though not necessarily dispositive, was "plainly relevant" to the *Meritor* Court. 477 U.S. at 72. Notably, the Court reversed the court of appeals' judgment that employers were always liable for sexual harassment by their supervisors. *Id.*

reached by the Sixth Circuit below and *Paroline* is caused by a difference in the facts, not a conflict in the rule of law applied. In *Paroline* the evidence showed that the employer had received complaints from some of its female employees about the harasser's misconduct before the plaintiff was hired, but took no adequate steps to stop it or prevent its reoccurrence. 879 F.2d at 107-108. Moreover, at the plaintiff's job interview, attended by a high-level manager, the harasser asked plaintiff inappropriate questions about sexual harassment in an effort to determine her willingness to tolerate it, and he then recommended that she be hired. *Id.* Finally, after plaintiff was hired, the harasser immediately made inappropriate comments and advances upon her, which she promptly reported. *Id.* at 103. However, management's inadequate reaction was to issue the harasser a written warning not to do it again. *Id.* The harasser and the victim were even left in the same working area. *Id.* at 103-104.

The *Paroline* court applied *Meritor's* rule that agency principles determine when an employer is liable for the acts of a supervisor. *Id.* at 106. Utilizing those principles, the court noted that liability could be imputed to

> an employer who anticipated . . . that the plaintiff would become a victim of sexual harassment in the workplace and yet failed to take action reasonably calculated to *prevent* such harassment. An employer's knowledge that a male worker has previously harassed female employees other than plaintiff will often prove highly relevant in deciding whether the employer should have anticipated that the plaintiff too would become a victim of the male

> employee's harassing conduct. *See Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987). . . .

Paroline, 879 F.2d at 107.[8]

Unlike Delta, the employer in *Paroline* was on notice of the harasser's proclivities before the plaintiff was hired (through harassment of other employees) and during her job interview (through inappropriate questions by the harasser), such that the Fourth Circuit ruled that a fact-finder should consider whether the employer could have prevented the harassment.

Paroline does not, therefore, deal with the factual situation that existed in this case, where conduct which was not foreseeable allegedly occurred and the employer took prompt, remedial action to end it. The prior, harassing conduct of which Delta was allegedly aware – the stock room kiss in 1980 or 1982 – was so different from the alleged conduct that led Ms. Reed to complain in 1991 (*i.e.*, a sexual assault), that Delta could not have anticipated that one would have led to the other. As the District Court stated:

> Delta cannot be held liable based upon notice given of a single incident occurring ten or eleven years prior to the notice upon which Delta took action when no other complaint had been made in the interim sufficient to give Delta notice of any offensive activity.

A16. The Sixth Circuit concurred. *Id.* at A28.

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[8] As the citation to *Yates* in the above-quoted excerpt makes clear, *Paroline* relied on the very Sixth Circuit line of authority Petitioner claims is in conflict with it. The *Yates* case was cited and discussed by both courts below (A10, A27), and is the cornerstone of *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178 (6th Cir.), *cert. denied*, 113 S.Ct. 831 (1992), also relied upon below.

Given that the court below and *Paroline* applied *Meritor*'s directive that agency principles determine employer liability for harassing acts of a supervisor (the difference in result being fact bound), there is no "conflict" between these two Circuits, and Petitioner's purported ground for certiorari does not exist.

The irony, of course, is that Ms. Reed's position is the one in actual conflict with *Meritor*. She argues that employers should be held strictly liable if their supervisors, unbeknownst to the employers, create sexually hostile work environments that injure subordinates, even if the alleged victim never complains. Brief of Petitioner, pp. 14-16. Such a rule is unacceptable under this Court's settled precedent. *See supra* note 7.

CONCLUSION

For the reasons set forth herein, this state law case is not a proper one for certiorari under Supreme Court Rule 10. But, even if it were, there is no conflict either between the court below and *Meritor* or the court below and *Paroline*. Instead, the decision below is in harmony with *Paroline*, and both courts properly applied *Meritor's* ruling that agency principles determine whether an employer is liable for the sexually harassing acts of its supervisor.

In applying those principles to the facts of this case, the court below properly found that Delta had no notice of any alleged sexually-hostile working environment created for Ms. Reed by Mr. Harris until she complained; and that when Ms. Reed finally did complain, Delta took immediate, appropriate remedial action to end it, thus

negating agency liability under the Tennessee Human Rights Act. Accordingly, the instant Petition for Writ of Certiorari should be DENIED.

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